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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
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LAWRENCE LUCIER and LAURIE)
LUCIER,)
)
Plaintiff,)
Case No. 312610 vs)
)
PHILIP MORRIS, INCORPORATED, et)
al.,)
)
Defendants.)
_____)

DEPOSITION OF DAVID J. TEECE, Ph.D.
Monday, March 11, 2002

REPORTED BY:
ANGIE DINER, RPR, CSR No. 9581

TOOKER & ANTZ
COURT REPORTING & VIDEO SERVICES
818 MISSION STREET, 5TH FLOOR
SAN FRANCISCO, CALIFORNIA 94103
(415) 512-0295.00002

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I N D E X

DEPOSITION OF DAVID J. TEECE, Ph.D.

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(For Plaintiff)

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BE IT REMEMBERED that, pursuant to Notice of Taking Deposition, and on Monday, March 11, 2002, commencing at the hour of 10:05 a.m. thereof, at the Law offices of Shook, Hardy & Bacon, 333 Bush Street, Suite 600, San Francisco, California 94104, before me, ANGIE DINER, duly authorized to administer oaths pursuant to Section 2093 (b) of the California Code of Civil Procedure, personally appeared
DAVID J. TEECE, Ph.D.,
called as a witness on behalf of the Plaintiffs, and the said witness, having stated under penalty of perjury, was thereupon examined and testified as hereinafter set forth.

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A P P E A R A N C E S

The Law offices of Wartnick, Chaber, Harowitz & Tigerman, 101 California Street, San Francisco, California 94111, represented by ROBERT M. BROWN, Attorney at Law, appeared as counsel on behalf of the Plaintiffs.

The Law offices of Shook, Hardy & Bacon, 333 Bush Street, Suite 600, San Francisco, California 94104, represented by SHANNON L. SPANGLER, Attorney at Law, appeared as counsel on behalf of the Defendant, Philip Morris, Incorporated.

The Law offices of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Three Embarcadero Center, Seventh Floor, San Francisco, California 94111, represented by JESSICA T. MOORE, Attorney at Law, appeared as counsel on behalf of the Defendant, R.J. Reynolds.

ALSO PRESENT: Stephanie Schrandt (Shook Hardy)

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EXAMINATION BY MR. BROWN
BY MR. BROWN: Q. Dr. Teece, will you give us your full name, please.
A. David John Teece, T-e-e-c-e.
Q. And you're a professor at Berkeley?
A. Correct.
Q. In what department?
A. The Haas School of Business.
Q. What are the courses you teach there?
A. I teach a number of courses. The ones I'm currently scheduled to teach relate to management of technology and corporate strategy.
Q. And over time, have you lectured or taught courses that deal with any aspect of litigation?
A. Yes, indeed. Even in the courses on the management of technology, I typically cover issues around antitrust, product liability and other sort of lower economic issues.
Q. What do you cover in product liabili ty?
A. Well, the new product development process, one of the factors from a managerial view that has to be taken into account is product liability regige.
Q. I didn't hear that word.
A. Product liability regige; regulatory structures, legal structures which may be different in different.00006

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countries.
Q. So you teach something that relates to the liability issues of products under products liability litigation rules?
MS. SPANGLER: Objection. Mischaracterizes the witness' t estimony.
MS. MOORE: Join in the objection.
THE WITNESS: The primary focus is on new product development and rollout. One of the factors to consider in new product development and rollout is the risk exposure that one might have or might not have, depending on the regige, depending on the product, depending on the technology.
BY MR. BROWN: Q. And does that course -- do you teach more than one course in that area?
A. Yes. There is an MBA course and there's a Ph.D. pro-seminar, which is like a half course.
Q. Give us sort of a brief outline of just the risk exposure part of product liability, related to the courses you teach.
A. Well, I don't believe I testified that I teach product liability courses. I teach a course or two courses on new product development.
Q. Right.
A. Both of those courses look at the environment,.00007

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associated with innovation. Part of their environment includes product liability issues, antitrust issues, standards issues or regulatory issues.
Q. Give us an outline of product liability issues that are in those courses.
A. Okay. The primary issues that I address that relate to product liability, essentially focus on the cost benefit trade-offs associated with rolling out new products in the commercialization strategies, the need to be employed, depending on exposure to product liability or other things. For instance, one can allocate the risk using licensing.
Q. Using what?
A. Licensing.
Q. Okay.
A. Because then the licensee will take some of the risks. So if there's a risk, a high risk associated with product liability, and the company wishes to spread that risk, then there are many ways of doing that, including for joint ventures through licensing or possibly not rolling out the product. Of course, that's always a choice.
Q. Have your courses involving the product liability issues included any looks at the tobacco industry?.00008

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A. I haven't had any readings for my students to focus specifically on tobacco. I have dealt with questions around allegations of suppression of innovation and things like that in the context of looking at some of the antitrust issues associated with new product development.
Q. Suppression of innovation in the tobacco industry?
A. That's not been the primary focus of what I've done. I may have mentioned, because I'm familiar with some of the allegations in this industry, I believe in one class I probably spent a few minutes discussing the kinds of allegations that have been made in the context of the tobacco industry, but it's certainly not a key feature, of course.
Q. Are these allegations that relate to the antitrust or personal injury liabilit y?
A. Antitrust.
Q. Okay. Do you teach a variety of courses that deal with some aspect of antitrust?
A. I wouldn't say there's a variety. There's a variety of different venues in which I've taught antitrust. At one point I taught an undergraduate class on business and public policy, which dealt with antitrust issues. I've given a number of seminars on antitrust.00009

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issues, and in fact, most recently the Federal Trade Commission held hearings in Berkeley on trust and innovations. I made two presentations there. I've gone to the law school and made presentations on antitrust issues, typically about innovation, where they're running a seminar and they want to consider a paper of mine of some of my work.
Q. Have you ever been retained as an expert by a tobacco company for an antitrust-related issue?
A. Yes.
Q. How many times?
A. At least two, I believe. It's the same issues that have come up on two separate occasions.
Q. I took antitrust a long time ago. J ust briefly, what were the issues that you dealt with in the antitrust concept?
MS. SPANGLER: Before you continue, I want to make sure that I understand where we're going, so I'd like to just take the witness out of the room and ask him a question very quickly.
MR. BROWN: All right.
MS. SPANGLER: Thank you, Mr. Brown. I appreciate the courtesy.
MR. BROWN: Can I have the last question read back..00010

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(Pending question read back.)
THE WITNESS: This specifically relates to tobacco, correct?
BY MR. BROWN: Q. No, I'm talking about the tobacco cases where you were hired by tobacco, so I assume it relates somehow to tobacco just from that fact; is that right?
A. Basically, what I was referring to is that I had been asked to consult from time to time on questions relating to allegations that the industry conspired to suppress safe cigarettes and that the industry conspired to suppress information on the health effects of smoking. Whether there were specific antitrust allegations or simply civil allegations, I don't recall.
I think in one case, the Thomas case, there was specific antitrust allegations, and I think in the U.S. case, there may have been specific antitrust allegations as well. I'm simply referring to the analytical lens that I use as an economist, the lens of antitrust economics.
Q. Well, I'm not real clear. Are you saying that your testimony in these cases were similar to what your testimony would be here?
MS. SPANGLER: Object to form, mischaracterizes the witness' tes timony..00011

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MS. MOORE: Join in the objection.
MR. BROWN: We can have a stipulation that anybody's objection applies to anybody.
MS. MOORE: That's fine with me.
THE WITNESS: No, I don't think so.
MR. BROWN: And I thought I got them down the right way.
Q. The conspiracy to suppress a safe cigarette, make a safe cigarette, and conspiracy to suppress the risk of smoking?
A. No. Information relating to the health effects of smoking.
Q. And was that concealment of their knowledge that they -- that, for example, the cigarettes were causing lung cancer?
MS. SPANGLER: Object to form, vague.
THE WITNESS: One of the allegations, I believe, was -- it related to the carcinogenic effects of smoking.
BY MR. BROWN: Q. The Thomas case, is that over? Is that completed?
A. I don't know for sure.
Q. Was it tried?
A. I don't know.
Q. Do you know where it was filed?
A. No..00012

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Q. The U.S. case, are you talking about the current government -- United States Government against tobacco?
A. Yes.
Q. Of course that's not over.
Have you been deposed in that case?
A. No.
Q. Do you expect to be?
A. I really don't have any expectation. If I'm asked to be presented for a deposition, I'm certainly willing to do so.
Q. Now, I'm not clear on how you would be involved in a conspiracy to suppress a safe cigarette. Just briefly, what would your role be in that, in terms of your expertise?
MS. SPANGLER: Objection to the form, calls for speculation.
THE WITNESS: First of all, I want to say I was not involved in any conspiracy to suppress a safe cigarette.
MR. BROWN: If I gave that impression, I didn't mean to. Did I say yours instead of tobacco? I didn't mean that.
THE WITNESS: Well, let me simply point out that the field of antitrust, antitrust economics in particular, as a large body of scholarly, work around.00013

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questions of conspiracy or cartels, and that body of work endeavors to explain the conditions that are necessary in order for cartels to be effective and what is needed to make cartels operative, in terms of mechanisms for monitoring and enforcement in tobacco and the like. So when an economist is asked to look at those questions, what is usually brought to the table, among another things, is an understanding of the industrial environment that supports or facilities collusion and the likely outcomes.

BY MR. BROWN: Q. Do you expect, in this case, to be asked questions about alleged conspiracy of RJR and Philip Morris to suppress the manufacture of a safe cigarette?

A. No.

Q. Same question with respect to conspiracy to conceal or suppress health risks regarding smoking?

A. No, except in an indirect sense. In dealing with punitive damages, I may be asked to address the reasons why punitive damages are sometimes imposed, in particular, deterrence questions. And I may be asked to opine as to the likelihood of future conspiracies if, in fact, historically there have been conspiracies or if a jury were to find that there had been conspiracies.

Q. Do you have an opinion as to -- I'm sorry, I.00014

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can't read my own writing -- with respect to punitive damages, why imposed -- I can finally read it.
Do you have any opinions here on whether punitive damages should be imposed on either RJR or Philip Morris?
MS. SPANGLER: Object to form.
THE WITNESS: I've been asked to look at the economics of punitive damages, and I haven't -- that question hasn't been put to me in that form.
BY MR. BROWN: Q. Well, are you going to render an opinion it should not be imposed here, in this case?
MS. SPANGLER: Objection. Calls for speculation.
THE WITNESS: If asked, and looking at it from an economic perspective, I would point out that the purposes of punitive damages, namely punishment and deterrence, have already been achieved, in part, through the MSA.
BY MR. BROWN: Q. So will you have an opinion that, "Yes, they should be imposed" or, "No, they should not"?
MS. SPANGLER: Objection. Asked and answered.
THE WITNESS: My opinion would be from an economic perspective. There's nothing more from a deterrence perspective. It can be achieved, so it.00015

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follows logically from an economic perspective, punitive damages wouldn't achieve anything positive, and in fact, it could have negative consequences or intended negative consequences.
BY MR. BROWN: Q. What are your assumptions as to what has already been achieved by punitive damage awards in the past?
MS. SPANGLER: Object to form, mischaracterizes the witness' t estimony.
BY MR. BROWN: Q. Let me withdraw that, because I'm not sure if when you say "they have been already achieved," achieved by punitive damage awards in part?
A. No, that was not the thrust of my answer.
Q. You said "already achieved." I'm trying to find out achieved as a result of what, if anything?
A. Well, a number of things. The primary factor that I made reference to is the MSA. I'd also make reference to regulations from the Federal Trade Commission and other governing agencies. I'd also make reference to the Surgeon General's pronouncements and the activities of other not-for-profit agencies. I'd also make reference to the independent voluntary actions of the tobacco companies.
Q. Let me go back to basics on this one.
What is it you think has already been achieved,.00016

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regardless of what may have caused it?
A. What has already been put in place through the MSA is what I would characterize as a "belt and suspenders," regulatory apparatus where basically 50 state attorney generals are in a position to monitor and enforce a series of fairly severe behavioral rules that are contained in the MSA itself.
Q. Has there been, as a result of any of these causes for something already has been achieved, is it your opinion that the cigarette companies now manufacture and sell a commercially safe cigarette?
A. I do not have an opinion on that issue.
Q. Would it be accurate to say that you do not believe that the tobacco companies have made any achievement, as a result of the MSA, with regard to designing, manufacturing and selling a safe cigarette?
A. Could I have that question read back?
(Pending question read back.)
THE WITNESS: The MSA is fundamentally behavioral in terms of what it impacts. It is designed to change behavior. And one of the things in the MSA is a -- is any joint activity is prescribed with respect to the suppression of a safe cigarette. And there are other elements of the MSA that severely impact the marketing practices of the industry..00017

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BY MR. BROWN: Q. Would your testimony here deal with punitive damages, in the sense of the allegation that punitive damages, in this case, would deter the defendants from continuing to make a cigarette that kills people?
MS. SPANGLER: I'm sorry, could I have that read back? I lost that.
(Pending question read back.)
MS. SPANGLER: Object to form.
THE WITNESS: I'm not quite sure what that question means.
MR. BROWN: Let me rephrase it.
Q. You're aware, aren't you, that between 90 and 95 percent of lung cancers in the United States are caused by smoking cigarettes; do you know that?
A. I'm certainly aware of numbers in that general magnitude. I'm not an expert in that area.
Q. Do you have an opinion as to whether or not there has been any activity by the MSA, by the states, or any lawsuit involving punitive damages, which has deterred the defendants in this case from manufacturing cigarettes which cause lung cancer?
A. Well, there's certain aspects of the MSA that have had the effect of reducing the total sales of cigarettes. And in that sense, there's less consumption.00018

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of cigarettes that might otherwise have been the case. But the MSA's provisions that I was making reference to essentially relate to the fact that the MSA proscribes behavior that would keep safer cigarettes off the shelf, or put differently, the companies, through the MSA, are monitored to make sure they don't engage in behavior that would suppress a safer cigarette, should one be developed.

Q. Would it be accurate, then, to say that you do not have an opinion as to whether or not any deterrent factor, which has occurred in the past, has led to the cigarette companies manufacturing and selling a cigarette which does not cause lung cancer?

A. Can I have that read back?

(Pending question read back.)

THE WITNESS: There's a double negative in there, I think. Could you maybe put it differently?

MR. BROWN: Okay. Let me read it. I'm not sure I see the double negative.

Q. Let me ask you to assume, hypothetically, that the defendant's cigarettes, both RJR and Philip Morris, are a major cause of lung cancer in the United States. Just assume that, all right?

A. Okay.

Q. Now, can you point to any change in the.00019

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manufacturing or design of RJR's or Philip Morris' cigarettes, which has been intended to eliminate lung cancer as a result of smoking their cigarettes, which was brought about by any of these deterrent factors you mentioned, MSA or any other?
MS. SPANGLER: Object to form, improper hypothetical and calls for speculation.
THE WITNESS: Well, there have been many efforts over the years to -- through research and development -- to improve cigarettes and to make them safe. Those efforts have continued post-MSA. And in the MSA, there are -- there is an agreement that there won't be any agreement amongst the -- or should I say there is a -- yes, there's a provision that there won't be any agreement amongst the companies to suppress safe cigarettes, should one be developed.
BY MR. BROWN: Q. In your opinion, is punitive damages an appropriate way to deter RJR or Philip Morris from manufacturing cigarettes that they know are causing a substantial amount of death among their smokers, caused by the smoking of their cigarettes?
MS. SPANGLER: Object to form.
THE WITNESS: Can I have that back again.
(Pending question read back.)
THE WITNESS: I think the -- as I said before,.00020

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the purposes of punitive damages are punishment and deterrence. The deterrence, as issue, is the deterrence of the behavior or the conduct that's been found to be legal. You know, their conduct relates to marketing practices and allegation of the suppression of information about the health effects of smoking. In my mind, as an economist, the -- there's a distinction between the behavior and the stated nature. State of nature is that cigarettes apparently have negative health consequences and are -- you know, that's something that is inherent in cigarettes. It's not pursuant to the marketing practices or the innovation strategies of the defendants.

Q. Do you have an opinion as to whether or not Philip Morris or RJR should be deterred by punitive damages in this case to stop knowingly selling cigarettes which kill millions of people?

MS. SPANGLER: Objection. Asked and answered.

THE WITNESS: Can I have that again?

(Pending question read back.)

THE WITNESS: Are you asking me whether they just should voluntarily stop selling?

BY MR. BROWN: Q. I'm talking about punitive damages in this case. I'm saying: Do you believe -- in your opinion, is punitive damages in this case an.00021

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appropriate way to deter Philip Morris or RJR from knowingly selling a product which kills millions of users of those products?
MS. SPANGLER: Same objection and assumes facts.
MR. BROWN: This is all, Doctor, about punitive damages, and what's appropriate by punitive damages and specifically what's appropriate here.
Let me rephrase it again.
Q. Do you have opinion that it is inappropriate to use punitive damages here to deter RJR and Philip Morris from knowingly selling cigarettes which kill millions of people?
MS. SPANGLER: Same objection.
THE WITNESS: As an economist, if there was a safer cigarette out there that was being suppressed, then I believe that absent other mechanisms, such as the MSA, there might be a case for punitives as a way to prevent the suppression of safer products if, in fact, the rouse for products -- I was referring earlier to the distinction between behavior and the state of nature. If the state of nature is that cigarettes -- the best cigarettes that can be made and the ones that people want to buy are ones that have negative health effects, I don't think, as an economist, that punitive damages should be or can be employed to stop that. It's inherent.00022

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in cigarettes, and it's inherent in the choices of consumers.
So if you're asking me the question: Should punitives be used to stop people smoking, in a direct sense, then -- by "direct sense," I mean in a sense of a prohibition, I would say "no."
I do believe that, you know, absent other mechanisms, that a case could be made that punitives could be used to change behavior and if deterrence hadn't already been effectuated.
Q. You're not a biologist, are you?
A. No.
Q. You don't have any medical training whatsoever?
A. Correct.
Q. You're not an expert in the design of cigarettes?
A. Correct.
Q. You're not an expert in the way cigarettes are manufactured?
A. Correct.
Q. I take it, then, you have no opinion as to whether or not RJR or Philip Morris could have, many, many years ago, designed, manufactured and sold a cigarette which would not have caused lung cancer?
A. I'm not sure that your inference is strictly.00023

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correct, because as an economist, it's reasonable for me to conclude that if such a cigarette was within the reach of available technology, there would be considerable financial benefit, individually to each company, if they could create the gold standard of cigarettes, one that had the taste and the other properties that consumers want, but didn't have any of the negative side effects.
Q. Isn't the fact, Doctor, that one of the conspiracies that existed among the tobacco defendants, these defendants, as well as the rest of the industry, most of the industry, was to suppress the methodology for making a safe cigarette in order to avoid having health -- so that no company would get an advantage by manufacturing a safe cigarette?
MS. SPANGLER: Object to form, assumes facts not in evidence.
THE WITNESS: I understand that there have been allegations made along those lines.
BY MR. BROWN: Q. Have you seen the documents which refer to the "Gentleman's Agreement"?
A. Yes.
Q. Do you know what the "Gentleman's Agreement" was?
A. I haven't re viewed those materials recently.
Q. Isn't the fact that the Gentleman's Agreement.00024

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was a device between the companies, including the defendants in this case, an agreement between the defendants, including these defendants, to prevent any company from obtaining a market share advantage by the research and development of a safe cigarette?
MS. SPANGLER: Object to form.
THE WITNESS: As I said about the notion of preventing anybody from coming up with such a cigarette, when there are multiple potential sources of innovation which are behind the tobacco industry, is, I believe, a fallacy. Or put differently, there are other ways in which such products could be developed, if, in fact, the science is available to do so.
BY MR. BROWN: Q. Isn't the fact that the Gentleman's Agreement entered into -- I'm not sure if it was the '50s or '60s -- was intended to prevent the companies from doing research and development on cigarettes to make them safer in order to avoid having one company or more than one company develop a market share advantage?
MS. SPANGLER: Object to form, calls for speculation, assumes facts.
BY MR. BROWN: Q. Or along the safety of the cigarettes?
A. I'm not sure the evidence bears that out. I'm.00025

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certainly aware of allegations to that effect.
Q. What do you think? You've looked at the internal documents. What's your opinion?
MS. SPANGLER: Same objection.
THE WITNESS: As I said before, I don't believe that even if there were a conspiracy of that kind, it could be effective, given the information structure that's out there and given the multiple sources of potential innovation and knowledge that lie beyond the defendants.
BY MR. BROWN: Q. You made analysis as to whether or not Philip Morris was willing to risk an extremely successful product line, brand of cigarettes line called "Marlboro" in order to be able to -- strike that.
I want you to assume something. I want you to assume that Philip Morris or RJR had the ability, as early as the 1960s, to manufacture cigarettes that would have not caused lung cancer. Assume that. Would punitive damages be an appropriate way to deter them from going ahead and continuing to make cigarettes that do cause lung cancer?
MS. SPANGLER: I'm sorry, can I have that read back?
(Pending question read back.).00026

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THE WITNESS: I'm not quite sure I understand the question. You're asking me to assume that they each individually had cigarettes that didn't cause lung cancer?
MR. BROWN: No. I didn't say that.
Q. They had the ability to design, manufacture and sell cigarettes which did not cause lung cancer, and they have chosen not to do so. I'll throw that in, in the assumption. Would punitive damages cause that choice, not to sell safe cigarettes, to be an appropriate way to persuade them they ought to?
A. Would anyone buy these cigarettes?
Q. What's your opinion? Is punitive damages something they ought to do, ought to be awarded here to stop that?
MS. SPANGLER: Object to form, vague and confusing.
MR. BROWN: Let me take it back.
MS. MOORE: Incomplete hypothetical.
BY MR. BROWN: Q. Let's d o it this way: Assume, one, a safe cigarette was doable, the defendants had the ability to manufacture them in the '60s.
A. Is that your definition, it's doable, the fact that you can manufacture something, whether or not anyone wants to buy it?.00027

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Q. We'll get to that in a minute.
But in order to get my question out, let me state it. I want you to assume that both RJR and Philip Morris had the ability in the '60s to design and manufacture a cigarette which would not cause lung cancer.
A. Okay.
Q. I want you to assume that they knowingly chose not to make that cigarette and have been selling it ever since, at the cost of hundreds of thousands of lives for people who have smoked their products.
You got that?
A. I think I understand your assumption.
Q. All right. The question has to do with punitive damages.
Given those assumptions, if the jury had found those to be true, would it be appropriate for the jury in this case to award punitive damages to persuade them to make that safe cigarette and stop making their deadly product?
MS. SPANGLER: Objection. Incomplete hypothetical confusing, assumes facts.
THE WITNESS: I'm not 100 percent sure I understand all the elements of your hypothetical, but I would wish to point out that it's quite possible,.00028

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particularly if the safe cigarette which you have described was not appealing to the consumer, that, in fact, you would have punitives, a perverse effect, people no longer buying cigarettes from the company that you named and instead substituting a more carcinogenic, such as Bidi or whatever else might be available.
You cannot, taking your hypothetical, I believe, come to the conclusion that you did without going further and asking whether or not these hypothetical products would be appealing to the consumers, whether they would buy them or substitute a way for other company's products that were more appealing to them and possibly more carcinogenic.
BY MR. BROWN: Q. So, then, is it your opinion, Doctor, that given the assumptions I asked you to take on in that hypothetical question, in your opinion, even if those assumptions turned out to be true and found by the jury to be true in this case, the jury, in your opinion, should not award punitive damages?
MS. SPANGLER: Same objections, and asked and answered.
THE WITNESS: Your hypothetical was very incomplete, and I can well imagine circumstances in which -- as I indicated -- punitives would have the perverse effect of making things worse..00029

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BY MR. BROWN: Q. I think your opinion that you're stating, then, might be indirect, but apparently under those assumptions, your opinion would be that punitive damages were not appropriate, right?
MS. SPANGLER: Objection. Asked and answered, mischaracterizes the witness' p rior testimony.
THE WITNESS: I said they could quite possibly be the correct answer. Your hypothetical is so incomplete, and I think purposefully avoids any discussion about whether or not consumers would find the hypothetical products that you wish me to assume existed, whether consumers would find them appealing or not.
BY MR. BROWN: Q. All right. Let's add to the hypothetical that they would be found appealing. Now, would punitive damages, under all those assumptions, including that the customers would find them appealing, would punitive damages be appropriate to deter them from continuing to make their deadly product, as opposed to the safe cigarette?
MS. SPANGLER: Object to form, calls for speculation, incomplete hypothetical, assumes facts.
THE WITNESS: Unfortunately, it's still an incomplete hypothetical, because the fact that some smokers may find it appealing does not necessarily mean that all smokers would find it appealing. And then you.00030

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would have to do some kind of a trade-off analysis, if some people purchase the cigarettes, but others substituted away, it could, once again, even if some people found it appealing, you could, once again, end up in the circumstances where punitives, in fact, took you backwards, from a public health perspective.
BY MR. BROWN: Q. I take it from that, you don't have an opinion on the hypothetical question I asked; is that right?
MS. SPANGLER: Object to form.
THE WITNESS: Given that it's incompletely specified, that would be correct.
BY MR. BROWN: Q. Okay. Have you made any assumptions as to what findings a jury would have to make in order for this case to move into a punitive damages phase where you would be testifying?
A. I've assumed, basically, that some of the allegations in the complaint had been found by the jury to be correct.
Q. Which ones?
A. Well, particularly the ones that relate to the allegations of improper behavior by the defendants.
Q. Meaning what?
A. Well, I believe it's quite a long list of allegations in the complaint. They range from marketing.00031

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practices -- including targeting youth through -- to confounding the understanding of the general public, and particularly among smokers, about the health effects of smoking.
Q. Do you assume any one or more of those are accurate allegations for the purpose of forming your opinion in this case?
A. Well, obviously, I'm in a position where liability has not yet been determined, and I don't know precisely which of the many allegations in the complaint, if any, are going to be found to be valid by the jury, but I'm assuming some will. I have a general framework, and I believe I can modulate that framework according to the particular issues that may be before the Court, if, in fact, this trial goes through the punitive damages phase.
Q. Have you been given an opportunity by the defendants to look at their internal documents?
A. Yes.
Q. Have you looked at the documents which relate to targeting younger people?
MS. SPANGLER: Object to form.
THE WITNESS: At various times I've seen some documents. I don't certainly claim to have seen all documents that relate to those allegations..00032

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BY MR. BROWN: Q. Who selected which documents you would receive and which ones you would not?
A. My staff.
MS. SPANGLER: Objection. Assumes facts.
BY MR. BROWN: Q. Your staff?
A. My staff.
Q. Were you given literally every internal document to pore through and decide which ones you would rely upon in terms of marketing youth, for example?
A. Are you asking about this particular case; is that correct?
Q. At any time.
A. I believe Dr. Ingberman -- in fact, on my behalf, has had access to a wide range of documents. As I said before, I don't believe he has reviewed them all, and I certainly haven't reviewed them all, but I've reviewed a number of them. Not recently. I have reviewed a number of them.
Q. That name was who.
A. I-n-g-b-e-r-m-a-n.
Q. And who is that?
A. He is a principal at the -- at LECG, and he has worked with me on this litigation.
Q. "LECG" is what?
A. It's an economic consulting firm..00033

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Q. Well, after you reviewed those youth-related documents that were provided to you by Dr. Ingberman --
A. Ingberman.
Q. I-n-g-b-e-r-m-a-n?
A. Correct.
Q. Was it your conclusion that, in fact, Philip Morris and/or RJR had, in fact, targeted young smokers?
A. I was not endeavoring to come to an opinion on that at the time that I was reviewing those documents. I was just trying to get a flavor for some of the documents in the record.
Q. What is your opinion? Did they target youth or didn't they?
A. I don't believe I have a -- as I sit here right now, and given it's sometime ago since I reviewed those documents, I don't have an opinion on that point at this time.
Q. Let's assume that Philip Morris and RJR, let me ask you to assume, targeted people as young as 12, 14 years old, with the intent to get them to start smoking. Would punitive damages be an appropriate method in this case to deter them from doing that in the future?
MS. SPANGLER: Object to form, incomplete hypothetical.
THE WITNESS: Well, as an economist, I would ask.00034

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the obvious question, as to given your hypothetical, whether or not other measures have already been taken, other regulations are in place or other agreements are in effect that would prevent such behavior, if, in fact, it had occurred. And as an economist and being aware of the fact that there are potentially negative consequences from punitive damages, I would want to make sure that we were not piling on and creating unnecessary costs and perverse effects.

BY MR. BROWN: Q. Now, did you assume in that answer that Philip Morris and RJR were, and, in fact, always have been targeting youth; they have been in the past, they are now? If not, I want you to assume that.

A. Yeah, I believe you asked me to assume that, and I did assume that.

Q. All right. And in your opinion, punitive damages to deter that would not be appropriate?

A. Given that the MSA is already in place and that there are -- that the MSA proscribes targeting youth and has a number of other features that are directed at those issues, then looking at it as an economist and given that the MSA is not just a piece of paper, but is an agreement, a court agreement, a court-sanctioned agreement involving 50 state attorney generals with the resources to monitor and enforce the agreement, given.00035

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that that's already in place, as an economist, I wouldn't see the need for more.
Q. Tell us what, in your examination of the --
"MSA" stands for "Master Settlement Agreement," correct?
A. Yes.
Q. What points in the MSA would you point to to show that the problem of marketing to youth has already been taken care of?
A. Well, there's a prohibition on youth targeting in the MSA.
Q. Specifically what?
A. Well, there's a stipulation that participating manufacturers may not target youth or take any action to maintain or increase the incidents of youth smoking.
Q. All right.
A. There's a ban on the use of cartoons, participating manufacturers may not use cartoons in advertising, promoting or packaging tobacco products. There's a limitation on tobacco brand names, sponsorship. Participating manufacturers may not sponsor concert efforts with a significant youth audience or where any paid participants are youths.
There is the elimination of outdoor advertising and transit advertisements. There's a ban on youth access to free samples. There's a ban on gifts to.00036

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underaged persons, based on proof of purchase. There's a minimum pack size of 20 cigarettes. There are commitments relating to corporate culture around youth access and consumption.
Q. What are you reading from there?
A. I'm reading from some notes I made, summarizing key provisions of the MSA.
MR. BROWN: Could we have that marked as an exhibit?
MS. SPANGLER: I have a copy here.
MR. BROWN: Good. So for the record, our "Notice of Deposition" is one, Exhibit 1. The portion of the "Designation of Experts" is two, and three are the notes just referred to by the witness regarding the MSA.
(Plaintiff's Exhibit Nos. 1, 2 and 3 were marked for identification and attached hereto.)
BY MR. BROWN: Q. Have you done any analysis, Doctor, on what the effects so far has been on youth smoking since the MSA was signed?
A. Well, I've read some of the general literature about the incidents of youth smoking, and I recognize, of course, that youth smoking is a function of many things. And the literature makes clear it's a function, in part, of attitudes by youth and not necessarily a function of behavior of the cigarette companies..00037

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Q. My question is: Have you made any analysis of the effects, so far, of youth smoking, from the MSA and reviewing literature? Is that what you've done?
A. Yes.
Q. And anything else?
A. No, other than being aware of the fact that the companies have complied with these provisions in the MSA that I just read out to you.
Q. And what literature did you review for the purpose of determining what the MSA's effect had been on youth smoking?
A. I believe there was a CDC study referencing a survey done in Massachusetts. I may be confusing that with the survey done on the use of Bidis. I'm aware there are sort of ongoing surveys of the incidents of youth smoking.
Q. Any other literature you can point us to before you go on?
What year was that CDC survey?
A. I don't remember.
Q. Do you have a copy of it here?
A. No.
Q. Do you have a copy of it in your office?
A. Yes.
Q. Can you give us a cite to it?.00038

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A. Yes. My recollection was correct, the survey or the study related to Bidis youth, among its youth. It wasn't specifically --
Q. "Bidi's"?
A. B-i-d-i. And it's April -- March, April, 1999.
Q. What were you referring to just now?
A. I was referring to a list of materials reviewed.
MR. BROWN: Can we mark that as our next exhibit.
(Plaintiff's Exhibit No. 4 was marked for identification and attached hereto.)
BY MR. BROWN: Q. While we're at it, does your notebook contain anything else that we've asked you to bring?
A. Yes.
Q. Bring it all out now and we'll mark it all.
A. Okay.
Q. Might as well get that done.
A. How would you like to do this?
MS. SPANGLER: Why don't we start with the vitae?
MR. BROWN: You've got two of all these things. Documents listing testimony is 6.
(Plaintiff's Exhibit Nos. 5 & 6 was marked for identification and attached hereto.).00039

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THE WITNESS: Mr. Brown, I have a few other documents that you didn't actually call for, but I did prepare them as memory aids for myself.
MR. BROWN: All right. Thank you.
THE WITNESS: They might be of some utility for you as well.
MR. BROWN: Why don't we make the one that said "Outline" the next in order, 7.
(Plaintiff's Exhibit No. 7 was marked for identification and attached hereto.)
MR. BROWN: "MSA Enforcement" is 9, and examples of "R&D by Major U.S. Cigarette Companies" is 8.
(Plaintiff's Exhibit No. 8 and 9 were marked for identification and attached hereto.)
BY MR. BROWN: Q. Is that it?
A. Yes.
Q. Everything else you have in your notebook is just a copy of what was already marked.
A. Did you get my resume? Actually, I don't have my resume here.
Yes, I do. Yes, I think you have a copy of everything that I have.
Q. All right. Thank you.
Did you bring anything else besides these documents which we have marked?.00040

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A. No.
Q. With respect to the MSA, let me ask you this:
Are all of these MSA provisions enforceable in all 50
states?
MS. SPANGLER: Let me just clarify. When you
say "these," are you talking about the ones that
Dr. Teece testified about earlier?
MR. BROWN: Yes, that's right.
THE WITNESS: I believe so.
BY MR. BROWN: Q. Do all of the states in the
United States make possession of tobacco illegal for a
minor?
A. I don't know the answer to that.
Q. Does the MSA prohibit the sale of cigarettes by
mail?
A. I don't believe there's a specific provision
dealing with that, but there may be indirect implications
of the MSA on such, on the use of such a channel.
Q. Can you point to a paragraph in the -- or a
section of the MSA which would put the tobacco companies
in breach if they sold cigarettes by mail?
A. Well, if they sold them by mail to target youth,
yes, then the provision I made reference to in youth
targeting, I believe would be a possibility.
Q. What provision does the MSA make to require the.00041

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-tobacco companies not to target youth by sales through the mail?
MS. MOORE: Objection. Misstates evidence.
THE WITNESS: Well, the MSA specifically proscribes targeting youth in advertising or marketing. It certainly doesn't mention mail, but to the extent that mail order was being used, I'm not a lawyer, but it would seem to me it would come under the provision I made ref erence to already.
BY MR. BROWN: Q. What does the MSA do to require, if anything, sales by mail to be made only to an adult?
That wasn't clear, perhaps.
What does the MSA require, if anything, that would provide a means of ensuring that sales through the mail not be made to a minor?
A. Well, there are enforcement provisions, and you've got 50 state attorney generals, where the organizational capacity to look into these things -- if there's a problem there, you've got at least 50 watchdogs, plus the Federal Trade Commission.
Q. Does the agreement have some specific requirements of the tobacco industry in the sense of restricting their sale to adults? I mean, for example, telephone checking of who's buying, a photograph of the.00042

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purchaser's driver's license, or anything like that? Whether you like those two examples or not, is there anything that requires the MSA -- requires the tobacco industries to do to ensure that youth are not buying through the mail?
MS. SPANGLER: Do you have a copy of the MSA with you?
MR. BROWN: No.
MS. SPANGLER: So you're asking for this witness' memory?
MR. BROWN: Yes.
THE WITNESS: It seems to me the MSA is loaded with provisions designed to minimize the chances that cigarettes would be -- would get into the wrong hands, in terms of what's legally proscribed. You know, I would include the surveillance and enforcement mechanisms of the MSA as being part of the agreement.
BY MR. BROWN: Q. Well, give us two or three examples of specific requirements in the MSA that are aimed at or that would have the effect of prohibiting sales to minors through the mail.
MS. SPANGLER: Objection. Asked and answered several times now.
THE WITNESS: Well, in addition to the specific provisions, I did read to you the provision around a.00043

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corporate culture of commitment that the defendants entered into, and I believe that since you obviously are in an agreement --
BY MR. BROWN: Q. Obviously in an agreement to what?
A. In any type of agreement, you can't cover every conceivable contingency. That provision, to me, essentially puts a strong onus on the signatories to this agreement to make sure that our youth are not targeted. And you've got the attorney generals acting as a watchdog to make sure that that is the way the agreement works.
Q. I take it, then, there are no specific requirements of the tobacco industry in the agreement that would assist them in preventing minors from buying through the mail?
MS. SPANGLER: Objection. Asked and answered and mischaracterizes the --
MR. BROWN: If there is, let us know.
MS. SPANGLER: I'm sorry if I interrupted you.
MR. BROWN: My fault.
MS. SPANGLER: Objection. Asked and answered, and mischaracterizes the witness' pri or testimony.
BY MR. BROWN: Q. Let me just rephrase it this way: Are there, in this MSA, are there requirements in the sale of tobacco through the mail that would have the.00044

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tendency to reduce sales by the mail to youth or are there not? You've read it. You're relying on it. Are there such requirements?
MS. SPANGLER: Objection. Asked and answered.
Can I have the question read back.
(Pending question read back.)
THE WITNESS: Yes. Your words were "the tendency to reduce sales by the mail to youth." Their proscription in here is targeting youth.
BY MR. BROWN: Q. What keeps a six year old with a good solid handwriting from writing in and obtaining a carton of cigarettes, if anything?
A. Hopefully, their parents. But there is a prohibition in here that, you know, the companies would target youth. So if -- you know, I don't think it catches any inadvertent sale, but it's clearly designed to avoid targeting youth through not just the blanket prohibitions, but through a number of mechanisms such as, for instance, the ban on youth access to free samples, the limitation of the pack size to 20.
Q. Does the MSA permit free samples on college campuses?
Or let's put it this way: Does it prohibit it?
A. Well, there's a ban on youth access to free samples, specifically with respect to college campuses..00045

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There's no specific reference to "college campuses" in the MSA, but there would seem to be a prohibition with respect to youth access that might well be applicable, at least in part.
Q. Do you know what a "kiddy pack" is?
A. I'm sorry?
Q. "Kiddy pack," referring to cigarette packs as "kiddy pack"?
A. No, I don't believe I do.
Q. Well, assume it's a cigarette package that contains fewer that 20 cigarettes. I think you mentioned MSA prohibits in selling in packs of less than 20?
A. Yes.
Q. When does that prohibition expire?
A. I don't know.
Q. What's the definition of an "underaged person" in the MSA?
A. I'd have to look at the MSA to remind myself of that.
Q. Isn't it, quote, "One who is under the minimum age to purchase or possess, whichever minimum age is older, cigarettes applicable -- cigarettes in that particular state, in the United States"?
A. I don't r ecall specifically.
Q. Do you know whether the MSA prohibits targeting.00046

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youth who are legally in possession of cigarettes, even though they can't buy them?
MS. SPANGLER: Objection. Confusing, vague.
BY MR. BROWN: Q. In other words, a child who cannot buy it, but they are in their possession, it's not illegal, are there any restrictions to what tobacco companies can do with respect to that individual?
MS. SPANGLER: Same objection.
THE WITNESS: I don't understand the question. Are you asking me if some kid has got cigarettes, is there anything that requires the tobacco industry to take the cigarettes off the kid?
MR. BROWN: Strike the question.
Q. Let's go back to this: I take it you don't have at your fingertips and your memory, a definition of what an underaged person is within the MSA; is that correct?
A. I do believe it's somewhat state specific, but I don't have a specific recollection, as I sit here right now.
Q. Does MSA limit self-service displays of cigarettes in retail outlets?
A. To the extent to which it might be construed as targeting youth, yes.
Q. Well, explain how that would work, if -- can you have a self-service display that doesn't target youth, as.00047

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opposed to a self-service display that does target youth? How would you make the distinction?
A. It's likely to be based on the nature of the premise and the traffic through the premise, whether it's primarily youth or primarily adults.
Q. The question is -- I'm not sure I'm getting an answer. Does the MSA prohibit or limit, in any way, self-service displays?
A. When you say "limit in any way," I mean, there are general provisions in here. I don't believe there's anything that is specific to self-service displays, although there may be, but there are a number of elements of the MSA that would have a bearing on that. But there's no specific reference to "self-service" that I'm aware of.
Q. When you say "have a bearing on that," are you referring to general provisions that they shouldn't target youth? Is that what you have reference to?
A. That is certainly one provision. There may be others.
Q. Can you give us any?
A. Well, there would be prohibitions on the label and so forth. There couldn't be cartoons on any self-service display and things of that kind.
Q. Any others?.00048

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A. There couldn't be outdoor advertising that would draw one's attention to where such self-service on equipment could be found.
Q. I didn't understand that. Could you explain that further?
A. Well, there's no limitation of the outdoor on the transit advertisements, so presumably you don't have those. You couldn't use them as a reference to guide people to where these self-service outlets might be located.
Q. Okay. How about point-of-sale advertising, is there any limit on that in the MSA?
A. Well, there's this general provision about a corporate culture, commitments relating to youth access and consumptions, where participating manufacturers must promulgate corporate principals to comply with the provisions of the MSA and the reduction of youths -- the product to be used by youths.
So that's a general provision that I think might have some bearing on these issues, but it's not directly referencing point of sale. I mean, for instance, I believe that you know one of the defendants has a weak heart problem, which, you know, is -- they have an expression of that company's efforts to reduce youth smoking..00049

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Q. So point-of-sale advertising is not prohibited by the MSA; would that be your conclusion?
MS. SPANGLER: Objection. Asked and answered.
THE WITNESS: Yeah, certain types are obviously -- cartoons can't be used. They can't be used anywhere, including point of sale.
BY MR. BROWN: Q. All right. But other than restricti ons that have something to do with advertising, generally there's nothing that restricts point-of-sale advertising in the MSA, is there?
A. Well, there's a whole bunch of general provisions that may have some impact on it. I agree with you. I'm not aware of any specific reference to "point of sale."
Q. For the purposes of forming your opinions, did you assume that the MSA has been complied with by RJR and Philip Morris?
A. No, not necessarily. I do assume, however, that there is devices for monitoring, or the mechanisms for monitoring complies with the MSA and that there's a mechanism for enforcing the MSA.
Q. Are there any restrictions on youth access specifically set out in the MSA, access to buying cigarettes?
MS. SPANGLER: Objection. Vague..00050

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THE WITNESS: Well, there is a ban on youth access to free samples.
BY MR. BROWN: Anything else?
A. That's specific to youth access?
Q. Right.
A. As I sit here right now, I'm not aware of anything that -- any specific language, other than what I just mentioned.
Q. Does the MSA prohibit or limit in any way the use of vending machines?
A. Well, there is a provision that prohibits product placement payments. And so to the extent to which the tobacco companies might want to use product placement payments to put a vending machine somewhere, there isn't -- there are limitations in that regard.
Q. What are the limitations on product placement payments?
A. Participating manufacturers may not pay for placement of tobacco products in movies, television shows, theatrical productions or otherwise, performances, music performances, commercials, films, videos or video games.
Q. Isn't product placement, which refers -- among other things -- to people smoking Marlboros in the movie and making it clear that it's a Marlboro and that they're.00051

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smoking it, it's restricted, not in movies, it has nothing to do with product placement in a 7-Eleven store, does it?
MS. SPANGLER: Objection, mischaracterizes testimony.
THE WITNESS: I don't think so, except in an indirect sense.
BY MR. BROWN: Q. Is there anything in the MSA which establishes a specific target for reducing youth smoking?
A. Not that I'm aware of.
Q. And is there any financial penalty in the MSA imposed on a -- on the tobacco industry or any particular company, which has failed to reduce youth smoking to some certain level?
A. When you say the company has failed to reduce youth smoking --
Q. Tobacco industry or the companies?
A. But youth smoke, not the company, so I don't quite understand the -- the company sells the product?
Q. For the sake of the question, let's assume that 75 percent of youth, of people under 18, are starting to smoke. Is there any penalty for not reducing that 75 percent through some action by the industry?
A. Do you wish me to assume that there is some.00052

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action by the industry that would reduce youth smoking?
Q. No. I want you to tell me whether there is anything in the MSA which financially penalizes the industry or company for failing to take the action which, in fact, reduces youth smoking at some point to the later time?
A. Well, if they don't engage in the actions that they have agreed to, there are penalties. But there is no quantitative threshold, in terms of results. I mean, the companies really don't, in an ultimate sense, don't control youth smoking; consumers do. But the companies have entered into commitments here to engage in behavior that would reduce youth smoking, and if they don't comply with those processes, yes, you know, they can be held in contempt.
Q. Do you agree that the MSA dissolves the Council for Tobacco Research?
A. Yes. Well, Council for -- Council for Tobacco Research, yes.
Q. In your opinion, why was that done?
MS. SPANGLER: Objection. Calls for speculation.
THE WITNESS: I don't know all of the details.
BY MR. BROWN: Q. Do you have an opinion as to why the CTR was dissolved by the MSA?.00053

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A. I believe there are allegations that the CTR was part of a process to confound the transmittal of information on the health effects of smoking.
Q. Okay. Does the MSA also dissolve the Tobacco Institute?
A. Yes.
Q. And that's an entity that was controlled by the tobacco industry, or at least most of the industry, correct?
A. I believe so, yes.
Q. And in your opinion, why was that dissolved by the MSA?
A. I believe for similar reasons.
Q. That the Tobacco Institute had been, in your terms, I think you're saying, confounding the health message about smoking?
A. I forget the specifics. We're talking about allegations. I would have to go back and look at those allegations.
Q. Isn't it a fact that the Tobacco Institute, over 50 years, made deliberately false statements about the health consequences of smoking?
MS. SPANGLER: Objection. Assumes facts.
BY MR. BROWN: Q. Didn't you find that in the documents you looked at, the internal documents?.00054

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MS. SPANGLER: Objection. Overbroad. Assumes facts.
THE WITNESS: Could I have that question again?
(Pending question read back.)
THE WITNESS: I didn't endeavor to make an opinion on that point.
BY MR. BROWN: Q. Let me ask you this: Has the MSA, in any significant way, any fundamental way, changed the way that cigarettes are sold today?
A. As compared to when?
Q. As to when? As to the time that the MSA was signed and agreed to?
A. I do believe that the MSA is being complied with. I haven't, at this point, sat down and calibrated the evolution of the company's practices. I mean, certainly the MSA contains -- proscribes behavior that may have taken place in an earlier time period. But there's been an evolution in the practices of the company -- of the companies over time, and I haven't sat down and benchmarked exactly where things were at the time the MSA was entered into and where they are today.
Q. Do you have any opinion as to how sales of cigarettes, the method of selling cigarettes, has changed in the last three years?
MS. SPANGLER: Objection. Asked and answered..00055

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THE WITNESS: I haven't sat down and specifically evaluated that.
BY MR. BROWN: Q. Does MSA, in any sense, punish the tobacco industry for the conduct that it had pursued prior to signing the MSA?
A. Yes, I believe so.
Q. And tell us how they were punished.
A. Well, there are significant monetary payments in the MSA. There is the general reputational effects associated with having to enter into an agreement with 50 state attorney generals. There is a limitation of rights that are quite considerable, arguably, 1st Amendment rights as well. For instance, requiring that old documents produced in smoking and health litigation become publicly available on the Internet for ten years, so there's tremendous restrictions on what the industry can do, and in particular, in their marketing practices.
Q. Isn't it a fact that RJR and Philip Morris are still advertising in youth-oriented magazines?
MS. SPANGLER: Objection. Assumes facts.
MS. MOORE: Objection. Vague.
THE WITNESS: What do you mean by "youth-oriented magazines"?
BY MR. BROWN: Q. Magazines in which a substantial amount of youth buy and read the magazine?.00056

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MS. MOORE: Objection. Vague.
BY MR. BROWN: Q. Are you aware of such? If not, we can move on.
A. I don't know what you mean by "substantial." I mean, I'm aware that magazines that are targeted to adults, you know, occasionally get read by children, although a certain percentage of the readership are younger people.
BY MR. BROWN: Q. We're not talking about the occasional younger person, the precocious child who wants to read scientific literature. We're talking about any magazine that has at least a substantial part of its purpose in being targeted to youth itself in a magazine. Are you aware that such magazines have been the subject of advertising by tobacco? If you are, great. If you're not, that's okay. Go ahead.
MS. SPANGLER: Same objections.
THE WITNESS: I'm not aware that there are magazines that target youth, that that was the primary audience that carried advertisements by the defendants.
BY MR. BROWN: Q. Is it a fact, Doctor, that following the MSA, and following the payments, you know, the actual payment under the MSA that is stated, is it a fact that increased prices of cigarettes paid for all of those payments?.00057

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A. No, I wouldn't ch aracterize it t hat way.
Q. Is it a fact, since the MSA agreement was signed that the profits of the tobacco industry have gone up?
A. I believe that profits have increased in recent years over an earlier period.
Q. And so in your opinion, if I heard your answer to my last question and the one before i t, correctly, it's your understanding that the payments that have been made under MSA were not, in fact, a result of increased prices?
MS. SPANGLER: Objection to form.
MR. BROWN: Let me rephrase that.
Q. Is it your opinion that the amounts of money paid out under the MSA were not derived from increased prices?
MS. SPANGLER: Same objection.
THE WITNESS: I wouldn't characterize it quite that way.
BY MR. BROWN: Q. How would you characterize it?
A. The MSA has increased the cost structure of those in the industry, because it has increased the cost structure of practically all of the manufacturers. And given that it's a competitive industry, you would expect some portion of that cost to be passed on to consumers..00058

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I believe that, in fact, one effect of the MSA was to cause prices to increase, not automatically, but over time.
Q. Isn't it a fact that the prices went up to a point where not only were all MSA payments paid for, there were additional profits available?
MS. SPANGLER: Objection. Asked and answered.
THE WITNESS: I don't know what you mean by "additional profits available."
BY MR. BROWN: Q. Profits went up -- they paid for all MSA payments required of them, and on top of that, they made more money?
MS. SPANGLER: Same objections.
THE WITNESS: I believe in certain time periods, there has been an increase in profit, not in all time periods.
BY MR. BROWN: Q. Okay. Now, has it been your -- have you formed the opinion that notwithstanding profits have gone up, notwithstanding that MSA payments have come from increased prices, that the MSA has somehow financially punished the industry?
MS. SPANGLER: I'm sorry, could I have that back? I missed the first part.
(Pending question read back.)
MS. SPANGLER: Objection. Mischaracterizes the.00059

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witness' p rior testimony.
THE WITNESS: When I made mention to "punishment," I was not just referring to, quote, "financial punishment."
MR. BROWN: Right. That's why I threw "financial" into the question.
THE WITNESS: So your question is again?
BY MR. BROWN: Q. I'll rephrase i t this way: Is it a fact that there has been no financial punishment of the industry as a result of the MSA; they've made more money than they ever have, and they paid for their MSA requirement payments out of their increased prices?
MS. MOORE: Objection. Vague, assumes facts not in evidence, misstates prior testimony.
THE WITNESS: As an economist, one can draw that conclusion without knowing the so-called "but for price would be"; in other words, you can't just simply benchmark profits to some prior period. I mean, there have been times in the industry where profits were high and other times when they were low. And there was a period of price discounting that I think began with Mildred Friday, but continued for a long period of time. And so you cannot come to the simple conclusion that I think you would wish to or that you are suggesting, without knowing what the price would have been but for.00060

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the MSA, and what the profits would have been but for the MSA.
MR. BROWN: All right.
MS. SPANGLER: Excuse me, Mr. Brown, we have been going almost two hours. Would it be appropriate to take a break?
MR. BROWN: Sure. I hope we can finish after that fairly quickly, without a lunch break. We can do that.
MS. SPANGLER: That sounds good. Let's take five or six minutes.
(Break taken, 11:47 - 12:02 p.m.)
MR. BROWN: Are we ready?
THE WITNESS: Yes.
BY MR. BROWN: Q. I was looking through Exhibit 6 during our break, trying to pull out of there the pages you've been retained in that have to do with allegations of cigarettes causing illness or injury. And I find, I think three. If you look at number 82, the Owens Corning case, that would be one.
A. Okay.
Q. And then there's Whitely?
A. Okay.
Q. That's 74.
And let's see, there is another one, I thought..00061

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I'm not sure where it is. Maybe you can find it. If I'm right, there were three cases. Was there another one?
A. The third one would be Lucier, which is not on here as such.
Q. So those three cases that we just went through, including this one, Lucier, would be the only time you've been retained by the defendant tobacco companies as an expert, with respect to a case in which allegations of cigarette causing injury or death were at issue?
MS. SPANGLER: Wait, I'm sorry. The document says "testimony" and you said "retained."
MR. BROWN: That's right.
Q. You were retained in three cases here where the questions of issue were the cigarette causing death or injury, correct?
A. These are the only cases where I've provided any testimony on those issues, that's correct.
Q. All right. Okay. In this case, about how many hours have you spent to date?
A. I don't know for sure, probably around a hundred, would be my guess.
Q. And what did you do in that 100 hours?
A. Reviewed relevant literature on punitive damages, reviewed the materials that I've identified here, and this list I provided you with. I took a trip.00062

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to Kansas City and had a number of meetings with attorneys and with Dr. Ingberman, who is -- who has helped me on this project.
Q. How many meetings with attorneys have you had?
A. I don't know for sure, three or four at least.
Q. And how many hours did that involve, ro ughly?
A. Well, one of them involved traveling to Kansas City.
Q. Apart from travel?
A. Oh --
Q. Actual face-to-face discussions with lawyers, about how much?
A. Probably eight to twelve hours, something like that.
Q. What did you discuss for those eight or twelve hours?
A. The testimony that I might give, should I be asked to testify at trial.
Q. Does the designation, which is No. 2 -- there's a couple sitting right in front of you there, page 6, lines eight through twelve.
Do you see that?
A. Yes.
Q. Do you want to read that for yourself for a moment?.00063

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A. Yes.
Q. Does that completely describe the subjects you talked about with the attorneys for this eight or twelve hours?
MS. SPANGLER: Objection. Overbroad, vague.
THE WITNESS: MR. BROWN: It was a one-sentence hitter for the discussions. That's reasonable.
BY MR. BROWN: Q. Other than the two that are there, and I see two, maybe you would call it three, but the first sentence seems to say that you're going to testify about "purposes and effects of punitive damages," and the second seems to say "Factors that should be considered in determining the appropriate amount." Does that cover everything that you expect to testify about?
MS. SPANGLER: Objection. Overbroad, vague.
THE WITNESS: Well, perhaps the outline I've provided you with this morning is a little more detailed. I mean, it's still, you know, a top-level outline, but I think it provides, perhaps, a little more detail in terms of the topics covered.
BY MR. BROWN: Q. Well, if we combined lines eight through twelve with Exhibit 7, which is the outline, would we then have a complete description of the areas in which you expect to testify?.00064

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MS. SPANGLER: Objection. Vague and ambiguous, overbroad.
THE WITNESS: As to main topics, yes, I think the description on page 6, plus my outline, is reasonable.
BY MR. BROWN: Q. In Exhibit 4, "Materials reviewed by David J. Teece," are all of the punitive damages articles you reviewed, which you expect to rely upon, listed there?
A. Well, bear in mind, I'm familiar with the fact that there is a very large literature on punitive damages, and, you know, I read that literature before I had exposure to this case. And I think these articles here are the ones that are most on point, but they certainly don't exhaust the literature in this area. And as someone generally familiar with it, I might draw upon a broader sort of articles, simply because over the years I've read more. But what I've reviewed for this case, this is the list.
Q. Okay. So you said -- I may have gotten that wrong. Did you say your meetings with attorneys, taking away travel time, were eight to twelve hours?
A. I believe that's what I said, eight to twelve, yes.
Q. Okay. How about the review of these articles.00065

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that are listed on Exhibit 4, how long did that take?
A. Well, let's just maybe think in terms of the residual, probably 30 percent of the residual.
Q. 30 percent of roughly 90 hours; in other words, 27 hours?
A. Well --
Q. Roughly?
A. Are you asking me about the --
Q. Time spent.
A. Excuse me. And are you asking me about all of these articles here, or just the ones relating to punitive damages?
Q. Well, let me take a look here.
A. When I say that the articles that specifically reference "punitive damages," such as the ones 9, 10, 11, 12, 13, 14, 15, 16, are you asking me about all of these materials?
Q. Well, let's say from 9 through 16, how much time did you review those?
A. You know, I didn't track it specifically, but if I had to estimate, it would be somewhere between, you know, 30 to 40 percent of the time, other than the time spent with attorneys.
Q. So, give or take some, about 30 hours; maybe more than that, maybe less than that?.00066

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MS. SPANGLER: Objection. Vague and ambiguous.
BY MR. BROWN: Q. I'm sorry, what?
A. We've got 90 hours left; is that right?
Q. Yeah -- not really. Eight to twelve gets you down lower than 90 hours, but I'm using rough numbers.
A. Yeah, I'd say the review of the literatures are approximately that amount.
Q. Okay. How long did you spend reviewing the "Master Settlement Agreement," No. 8?
A. I made -- you know, I've looked at it, I've picked it up on numerous occasions, I just don't recall how much time I've spent on it when I picked it up. I usually go on to the certain segments, not necessarily read the whole thing each time I picked it up, so I don't know for sure.
Q. I take it you produced Exhibit 3, that's your work effort, that's the "MSA Behavioral Restrictions"?
A. Yes, it's prepared under my direction.
Q. You've read the entire MSA?
A. Yes.
Q. And this Exhibit 3, are those what you thought were the most significant points which you would be testifying about with regard to the MSA?
MS. SPANGLER: Objection. Vague and ambiguous.
THE WITNESS: From an economic perspective and.00067

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focusing just on enforcement, these are the key provisions.
MS. SPANGLER: I'm sorry to interrupt. I think there's some confusion, Bob. You're referring to Exhibit 3 as marked by the reporter, correct?
MR. BROWN: It says "Exhibit 2" at the top, but it's Exhibit 3.
THE WITNESS: Yes, there is some confusion.
MR. BROWN: That's what I'm looking at.
THE WITNESS: Okay. So my Exhibit 2, is that what you're asking?
MR. BROWN: Is Exhibit 3, right.
THE WITNESS: Okay.
BY MR. BROWN: Q. You put this together, correct?
A. It was done under my direction, yes.
Q. How long did that take?
A. To pull it together?
Q. Yes. Your time?
A. Well, not very much of my time. Probably an hour discussing it with Dr. Ingberman, what I needed.
Q. When was the last time you read the MSA?
A. Last night.
Q. Did you read it all?
A. Pardon me?.00068

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Q. Did you read the whole MSA all last night?
A. Didn't read it all last night.
Q. What percentage did you read, 10 percent?
90 percent?
MS. SPANGLER: Objection. Vague and ambiguous.
THE WITNESS: I read the sections that dealt
with the behavioral -- what I refer to as "behavioral
constraints."
BY MR. BROWN: Q. That's those that are listed
on Exhibit 3?
A. Yes.
Q. Okay. Now, does Exhibit 3 contain the
significant parts of the MSA that you expect to testify
about?
MS. SPANGLER: Objection. Vague and ambiguous,
calls for speculation.
THE WITNESS: Does the court's Exhibit 3 also
include the section on enforcement?
Have you got my exhibit?
MR. BROWN: You're going to -- Exhibit 3 is this
document. Okay.
THE WITNESS: It is that, plus this other page
here, which has "MSA Enforcement" on it.
MS. SPANGLER: I'm sorry?
MR. BROWN: Exhibit 9..00069

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Q. Referring to Exhibit 9 for a moment, your "MSA Enforcement," on how many occasions have some attorney general or some attorney generals brought an action against some tobacco company or companies to enforce the MSA?
A. What do you mean by an action?
Q. Filed suit?
A. Filed a suit?
Q. Yes.
A. I'm not sure at this point.
Q. I guess "filed suit" would be wrong. A court retained exclusive jurisdiction over the enforcement rights. How many times has the attorney general or attorney generals gone to the court and asked for orders restraining MSA violations?
A. I'm not sure they have, as of this point.
Q. Okay. MSA was signed when?
A. Oh, I'm not 100 percent sure. If we have it here, we can certainly look.
Q. I don't have it. It looks like 1998. Okay. I don't know when in '98. It doesn't say, but -- so it's your recollection there have been no enforcement actions taken since '98?
MS. SPANGLER: Objection. Mischaracterizes the witness' tes timony..00070

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THE WITNESS: You see, I would define "enforcement action" broader than you do, which is constantly surveilling the industry to make sure that the industry is in compliance. And the attorney generals are resourced to do that, and it's my understanding they've been doing that.
BY MR. BROWN: Q. What gives you the idea the attorney generals have the resources to do that?
A. Well, my understanding is that under the MSA, there's 50 million a year that's appropriated, if that's the right word, to support MEG.
Q. How much of that money has been spent enforcing MSA?
A. I don't know for sure.
Q. A significant amount?
MS. SPANGLER: Objection. Vague and ambiguous.
BY MR. BROWN: Q. Virtually none? A whole bunch? What's your sense?
A. I don't know.
MS. SPANGLER: Same objection.
MR. BROWN: Don't know, okay.
Q. All right. Now, are you familiar, generally, with the claim that RJR and Philip Morris recognized that if they did not successfully target youth, it would virtually spell the end of the industry for them?.00071

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MS. SPANGLER: Objection.
BY MR. BROWN: Q. Are you aware of that claim?
A. By "claim," you mean am I aware that someone has alleged that in litigation?
Q. Right. I'm not sure "allege" is the right word. That sounds like it's written down. Let's use "claim" a little broader than "allege."
MS. SPANGLER: I want to make sure I understand what the question is. Could you state the question?
MR. BROWN: Let me do this.
Q. I want you to assume that the tobacco industry, generally, and RJR and Philip Morris, specifically, recognized back in the '60s, if not earlier, that if they didn't have a large share of what they call "the youth market," which were -- included a large share of people smoking who were under 18 years of age, that if it di dn't have that share, their future would be bleak in terms of selling cigarettes. I want you to assume that they recognized that. Okay?
A. I'm not sure that I even understand your hypothetical. Are you asking me to assume that collectively or individually?
Q. Well, I -- they didn't get together and decide it. I'm asking you to assume that most of the industry, including these defendants in this case, RJR and Philip.00072

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Morris, recognized that the youth market, defined as "including under 18 and all the way down to a very young age," was essential to their future in the market. I want you to assume that that's a recognition that was made by these defendants and others.
A. And just so I understand, "their," t-h-e-i-r, is that individual's -- or didn't relate to the overall industry, but it's like if Philip Morris doesn't have its share?
Q. That's right.
A. That -- of the youth -- so-called "youth market," to use your hypothetical, that they wouldn't be able to sustain market share later; is that the assumption that you want me to make?
Q. Yes. Are you aware of documents in the RJR possession, their internal documents, which express concern that Philip Morris has a large share of the under 18 market, and if RJR doesn't do something about it, there's going to be trouble down the line; are you aware of such documents?
MS. SPANGLER: Objection. Vague and ambiguous.
THE WITNESS: I'm not sure if I'm aware of anything that characterizes it exactly in that fashion.
BY MR. BROWN: Q. Something similar to that?
MS. SPANGLER: Objection. Vague and ambiguous..00073

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THE WITNESS: I don't recall a specific document, as I sit here right now, but certainly there have been documents that make reference to sales to different age cohorts.
BY MR. BROWN: Q. From the documents you have seen, would you agree that RJR and Philip Morris were highly motivated to sell cigarettes to people under 18 years of age?
MS. SPANGLER: Objection. Vague and ambiguous. Calls for speculation.
THE WITNESS: What do you mean by "highly motivated"?
BY MR. BROWN: Q. It was a market they felt was very important to their future?
MS. SPANGLER: Same objection.
THE WITNESS: I'm not sure I would characterize it that way. As I said before, there's certainly documents that speak to sales by different age cohorts.
BY MR. BROWN: Q. All right. Let me ask you to assume this: That both RJR and Philip Morris have a strong motivation, and have always had a strong motivation, to ensure that its large number of people under 18 are smoking as possible. Just assume that. Would that be an appropriate area to use punitive damages to persuade them that, notwithstanding.00074

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their motivation, that they do not go forward with youth targeting?
MS. SPANGLER: Objection. Incomplete hypothetical, vague and ambiguous.
THE WITNESS: From an economic perspective, the relevant aspect of punitive damages here is deterrence. So given your hypothetical, the question is: Would punitive damages deter just behavior, or could it incrementally deter such behavior?
As I believe I've already testified, I believe the MSA, the Federal Trade Commission and other governing agencies, already created a structure which proscribed youth targeting, and that structure is not just an empty agreement, it's an agreement with a monitoring and enforcement mechanism. So it's difficult for me to understand how punitives would achieve any incremental deterrence, and, in fact, as I indicated earlier, there's a chance that if you go too far, you may end up with perverse effects.
BY MR. BROWN: Q. Do you have an opinion as to what the future market share would be of Philip Morris, if commencing at the time that the MSA was signed, a majority of the kids who started to smoke since that time had not started to smoke and that continued, the majority of the kids who had been starting at that early age did.00075

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not, and into the future did not start --
MS. SPANGLER: Objection --
BY MR. BROWN: Q. -- what would the loss of that youth market do to the future marketing share of Philip Morris?
MS. SPANGLER: Objection. Vague and ambiguous, compound.
MR. BROWN: That's probably right. Let me rephrase it, because I finally stumbled upon what I wanted to ask.
Q. In your opinion, what would the future market share be of Philip Morris losing a majority of the smokers that are under 18, not only existing smokers, but for the future?
MS. SPANGLER: Same objections.
THE WITNESS: Well, I don't have a specific answer, but I can answer it in a general way. There have been large shifts of market shifts in the industry over time. I don't think that the driver for those market share shifts has been the ability to win youth smokers; in other words, I'm casting serious doubt, based on the aggregate evidence available to me, that, in fact, getting a smoking cohort early, guarantees your subsequent market share.
BY MR. BROWN: Q. So in your opinion, the loss.00076

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of a substantial share of the youth market, the under 18 market, by Philip Morris, wouldn't make any significant difference to their market share in the future?
MS. SPANGLER: Objection. Mischaracterizes the witness' p rior testimony.
THE WITNESS: That's not what I said. What I indicated is that there have been very large swings of market share over time in the industry. There are many factors that explain that, and it's by no means clear that the dominant factor is access to a particular smoking cohort early on.
BY MR. BROWN: Q. In your opinion, Doctor, would a substantial loss of a large share of the youth market, the under 18 market, cause adverse impacts -- cause an adverse impact to Philip Morris' future marketing?
MS. SPANGLER: Objection. Vague.
THE WITNESS: We're still in this hypothetical world, and you're asking me to assume that a company has an "X" amount of youth market, and you're asking me if you lose that youth market, does that compromise you later on?
MR. BROWN: Right. That's not my question, but I'll accept it for now.
THE WITNESS: Okay, and what assumption are you.00077

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wanting me to make with respect to competitors? If you, in your hypothetical, if one company gains youth market, does the other lose, or is it total market shrinking? What's the reason for the reduction in the youth market?
BY MR. BROWN: Q. Why does that make a difference to your answer?
MS. SPANGLER: Objection. Vague.
THE WITNESS: Because the impact on market share is clearly different as to whether or not you lose shares to a competitor or whether people simply -- to the extent which they commence smoking later on.
BY MR. BROWN: Q. Well, I'm not sure why -- I'm still not sure why you're asking me that question, but let me see if I can make my question as clear as possible.
I'm not asking you to assume anything more than just generality here. What I want you to assume is that Philip Morris has a relatively large share of the youth market, the under 18 market.
A. Okay.
Q. If they lost that, whether to anybody or not, what would that -- what would the impact be on Philip Morris' share of -- future share of the market?
MS. SPANGLER: Objection. Incomplete hypothetical, vague and assumes facts not in evidence..00078

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THE WITNESS: I'm not sure you can give an unequivocal answer. It depends on whether or not Philip Morris is able to contest for adults with other cigarette manufacturers. People do switch brands, sometimes pursuant to the introduction of new products, sometimes pursuant to marketing programs, but I certainly do not subscribe to the view that the only determinant of market share in subsequent age cohorts is the market share you have in an early age cohort.

BY MR. BROWN: Q. If you recall, my question didn't talk about the only determinant. What I asked you to give us, if you have an opinion on it -- maybe you don't. Do you have an opinion as to whether there would be an adverse -- substantial adverse impact to Philip Morris, if future market share -- if they lost their youth market, their under 18 market?

MS. SPANGLER: Objection. Incomplete hypothetical, vague and assumes facts.

THE WITNESS: I can only answer it at this point, since I haven't specifically focused on that in a general level.

I noticed very large swings in market share in the industry over time. I've not seen evidence that ties those swings of market share to the loss of younger smoking -- of younger smokers of a cohort. So that would.00079

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suggest to me that they're, you know, that in the total scheme of things, while it could be a factor in subsequent sales, it's not the dominant factor. But I have not done a full-fledged study of that.
BY MR. BROWN: Q. Do you know what the effect of youth market is on brand loyalty in the cigarette industry; in other words, if a 14 year old starts smoking Marlboro, what percentage of those 14 year olds who do that will continue to smoke Marlboro the rest of their lives?
MS. SPANGLER: Objection. Vague.
THE WITNESS: I haven't reviewed any studies on that recently.
BY MR. BROWN: Q. Same question. It's a 26 year old, starts to smoke for the first time and starts to smoke Marlboro, what is the percentage of those 26 year olds that would remain loyal to Marlboro for the rest of their smoking life?
A. I don't know.
MS. SPANGLER: Objection. Vague and ambiguous, compound.
BY MR. BROWN: Q. I want you to assume that at the present time and ever since the MSA -- at least since the MSA and forward, the Philip Morris and the RJR shares of the under 18 market, under 18 smoking public, has been.00080

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large and very important to them, is it your opinion that signing the MSA would overcome that importance to them, and they would ignore the youth market?
MS. SPANGLER: Can I hear that again?
MR. BROWN: I'll state it again.
Q. Is it your judgment that by signing the MSA, a youth market, which is extremely important to them, they could just turn their back on and move forward?
MS. SPANGLER: Objection. Assumes facts, vague and ambiguous.
MR. BROWN: Let me withdraw it. The thought is good. The wording is terrible.
Q. You spent that eight to twelve hours -- you were with the attorneys discussing with them their compliance, or lack of it, of the MSA?
A. I did spend a little bit of time on that issue, not a lot.
Q. Did these -- who were they, by the way? Can you name them for us?
A. I'm bad at names. I'd be happy to give you a list, if you would like.
Q. You don't know who they were, offhand?
A. Well, I started off with Laurie Faye, and I've been working with Ms. Spangler here.
Q. Did any of those lawyers assure you that Philip.00081

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Morris was in compliance with the MSA without any exception?
MS. SPANGLER: Objection. Vague and ambiguous.
THE WITNESS: I didn't ask that question.
BY MR. BROWN: Q. What have you done, if anything, to determine whether Philip Morris or RJR are in compliance?
A. What I've done is to check if the teaming in the MSA -- and I reviewed the MSA from an economic point of view, and generally am aware of its key features. And I believe that there's teeth in this agreement; that there are more than 50 state agencies and -- well, you got the 50 state attorney generals, the Federal Trade Commission, the FDA, you've got a whole bunch of governing agencies looking at the industry.
As I said to you earlier, I believe this is a belt and suspenders approach, and if a company, one or more companies doesn't comply with this agreement, I have every confidence that one or more of those 50 attorney generals will jump into action to ensure that the agreement is honored.
Q. So the answer is that you haven't done any analysis to determine whether they have complied, but you'd expect them to, because there's, quote, "teeth" in the agreement. Would that be right?.00082

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MS. SPANGLER: Objection. Mischaracterizes the witness' p rior testimony.
THE WITNESS: I haven't sat down and at this point, at least, and reviewed every allegation or issue surrounding compliance. I've certainly reviewed the MSA and concluded that it's a pretty onerous document with strong monitoring and enforcement provisions.
BY MR. BROWN: Q. Are the enforcement provisions so strong that either one of these companies are likely to give up their efforts to obtain the youth market?
MS. SPANGLER: Objection. Vague and ambiguous, assume facts.
BY MR. BROWN: Q. Which is a stronger motivation, they signed a document or their future marketing is at stake? Which would be stronger to you?
(Pending question read back.)
MS. SPANGLER: Objection. Vague and ambiguous, and assumes facts not in evidence.
MS. MOORE: Calls for speculation.
THE WITNESS: I'm not quite sure what you mean by a "stronger motivation." I do believe that they have to comply with this, and that the 50 state attorney generals will ensure that they do comply with it.
MR. BROWN: All right. Let me ask this question.00083

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about the MSA.
Q. In your opinion, does it do an adequate job to prevent Philip Morris or RJR from going after the youth market?
MS. SPANGLER: Objection. Vague and ambiguous.
BY MR. BROWN: Q. In your opinion?
A. Does it do an adequate job?
Q. That's right. Are there adequate provisions in here to protect against RJR and/or Philip Morris ignoring the document and going after that youth market?
MS. SPANGLER: Same objection.
THE WITNESS: I believe there's, you know, quite a number of provisions in this which are severe with respect to constraining their marketing practices with respect to youth.
BY MR. BROWN: Q. My question is a little different. I know there's a lot of provisions. You've told us about some of them.
A. Right.
Q. Is there enough there to prevent prolonged strong enforcement? Is there enough there to prevent Philip Morris or RJR from going after the youth market?
MS. SPANGLER: Objection. Vague and ambiguous, calls for speculation.
THE WITNESS: As an economist, you know, I can.00084

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only look at these -- I'll characterize them as "regulatory mechanisms," as compared to other industries. And I don't know of any other industry where the marketing practices are proscribed as severely as they are here.
BY MR. BROWN: Q. My question is: Are these provisions that you've referred to, are they adequate, in your opinion, to prevent youth marketing by either RJR or Philip Morris?
MS. SPANGLER: Same objections, and asked and answered.
THE WITNESS: They clearly prevent youth targeting, and I recognize it as a practical reality. If you're selling illegal product in the open marketplace, there's always a possibility that someone you don't target gets to buy your product. It's not clear to me, you know, short of making the product itself legal, how you could go much further and still maintain an open marketplace.
BY MR. BROWN: Q. Has under 18 smoking gone up or gone down since MSA?
MS. SPANGLER: Objection. Vague and ambiguous, and asked and answered.
THE WITNESS: I haven't looked at that data recently..00085

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BY MR. BROWN: Q. Okay. Let me ask -- I think we're getting close to the end here, I hope. The second area that was listed in your designation, I think it's in front of you there somewhere, it says, "Various factors that should be considered in determining the appropriate amount, if any, of punitive damages."
A. Right.
Q. In general, what are the appropriate factors that should be considered in determining the amount?
A. Well, if I may draw your attention to my outline, I think in two and three, those factors are identified.
Q. All right. Those bullets there, in two or three, are the factors you're talking about?
A. Yes.
Q. All right.
A. You know, they got the headers.
Q. Is it your opinion there should not be punitive damages awarded here in this case?
MS. SPANGLER: Objection. Asked and answered.
THE WITNESS: I don't think I have anything to add to my earlier answer to that question.
BY MR. BROWN: Q. Well, I'm not sure -- in fact, I know you haven't said "yes" or "no" to that. Are.00086

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you able to say "Yes, they should be awarded in such amount," or, "No, they shouldn't be awarded in any amount"? What is your selection?
MS. SPANGLER: Objection, vague and ambiguous.
THE WITNESS: I can only look at this from an economic perspective. What I observed is that with respect to the deterrence, the MSA and other regulatory mechanisms already achieved -- that in my view, they already achieve it very comprehensively. I'm also very cognizant of the fact that if you lay on beyond what is already there, you run a severe risk of adverse unintended consequences. And so as an economist, and bearing in mind what's already been achieved and the potentially adverse unintended consequences, I would be extremely cautious about punitive damages.
BY MR. BROWN: Q. I'm sorry, I didn't mean to --
A. Extremely cautious about recommending punitive damages.
Q. Okay. Cautious to recommend, meaning you would recommend none?
A. I would explain to the jury, if I had the opportunity, what the situation is, as I've explained to you just a few moments ago, and that would be for the jury to choose..00087

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Q. Let me direct your attention to the punishment side of punitive damages. In your opinion, has the conduct of RJR and Philip Morris been such that they are not deserving of any punishment through punitive damages?
MS. SPANGLER: Objection. Vague and ambiguous, lacks foundation.
THE WITNESS: What do you mean by "deserving of punishment"?
BY MR. BROWN: Q. Conduct in which a jury could reasonably find that they should had been punished for what they've been doing for 50 years, which is killing millions of people.
MS. SPANGLER: Same objection and assumes facts not in evidence.
THE WITNESS: I would observe that there has already been a punishment, it will be with future litigation. Additional punishment -- the very fact of litigation itself, the cost of litigation, the damage to reputation, to me as an economist, I would categorize that as "punishment."
BY MR. BROWN: Q. So in your opinion, the punishment for Philip Morris' conduct in the past, and RJR's conduct in past, has already been provided and has been adequate; is that your testimony?
MS. SPANGLER: Objection. Vague and ambiguous..00088

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THE WITNESS: In terms of being provided, yes, I believe there already has been punishment. In terms of adequacy to me, as an economist, the key issue is deterrence: Has the industry been deterred from engaging in the acts that have been found to be illegal. I've already testified I think the MSA and the other regulatory apparatus in place does that. And to lay on top additional punishment through punitives runs the risk of negative unintended consequences.
BY MR. BROWN: Q. In your opinion, what difference, if any, has there been in the number of people who die as a result of smoking RJR or Philip Morris cigarettes? What decline, if any, has there been since the MSA has been signed?
MS. SPANGLER: Objection. Vague and ambiguous, and calls for speculation.
THE WITNESS: I don't know the answer to that.
BY MR. BROWN: Q. What difference, if any, in your opinion, will there be in the number of people who die in the next 20 years as a result of the MSA and its impact on Philip Morris and RJR?
MS. SPANGLER: Objection. Vague and ambiguous, and calls for speculation.
THE WITNESS: As I understand it, the punitive damages would -- if imposed -- would relate to the.00089

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illegal conduct. Selling cigarettes itself, as I understand it, is not -- at least not as yet, illegal in the United States. So it seems to me that the -- in thinking through punitives, you have to pay attention to the illegal acts. You can't use punitive damages to achieve other public policy goals that lie outside the litigation at hand. So when you put that question to me, it seems to imply that maybe cigarettes should be illegal.

BY MR. BROWN: Q. I don't know, Doctor. You've been talking about deterrence. I've been asking about deterrence for a couple hours now. What I'm asking goes to the heart of deterrence. What new conduct, as a result of the deterrence you described has already occurred, what will that new deterrence mean in terms of reduced number of people who die from smoking Philip Morris or RJR cigarettes over the next 20 years, if any? Will any fewer people die or stay about the same, regardless of this deterrence?

MS. SPANGLER: Objection. Vague and ambiguous. It also calls for speculation.

THE WITNESS: I don't know the answer to that question.

BY MR. BROWN: Q. Let me ask you a couple quick questions about the history of punitive damages in the.00090

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RJR and Philip Morris area.
First of all, have Philip Morris or RJR ever paid any punitive damages to any plaintiff?
A. I'm not sure they have as yet.
Q. How many times have they been awarded?
A. I don't know.
Q. Are you familiar with the Portland case that awarded 80 million and was cut to, I think, 50 million, the William case up in Portland?
A. No.
Q. Are you familiar with the Whiteley and Henley cases that resulted in 25 million and 20 million?
A. Yes.
Q. Are you familiar with the Bocun case in Los Angeles that resulted in a reduction to 100 million in punitive damages?
A. Yes.
Q. Are you aware of any other punitive damage awards besides those?
A. Not as I sit here right now.
Q. All right. Can you point to any specific action regarding safety that the MSA has caused Philip Morris or RJR to take with the design and manufacture of their cigarettes?
MS. SPANGLER: Objection. Vague and ambiguous..00091

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THE WITNESS: Well, it does proscribe, as I mentioned to you already, in the agreements to restrict the development and sale of safe cigarettes. I believe that's in there somewhere.
BY MR. BROWN: Q. All right. You mentioned that before.
Any others?
A. Any others that do what? Remind me again.
Q. The MSA -- let me expand on it.
What has RJR or Philip Morris done in the area of designing and making safer cigarettes, as a result of the MSA or any other deterrent factor which you've talked about today?
A. I believe they've continued to work on the Eclipse and Accord programs.
Q. Okay. Any others?
A. There's continued allocation of research and development dollars to new potential safer cigarette opportunities.
Q. Like what, other than Eclipse and Accord?
A. I don't know the details of their R&D programs.
Q. Can you give me any generalities of what they're doing in R&D that was -- in your opinion -- that was motivated by MSA or some other deterrent factor?
MS. SPANGLER: Objection. Calls for.00092

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speculation, vague and ambiguous.
THE WITNESS: Not as I sit here right now.
BY MR. BROWN: Q. Okay. Your hourly rate is how much?
A. 650.
Q. Okay. And you think you've worked about a hundred hours on this case so far?
A. Sounds about right.
Q. How many more do you expect to put in?
MS. SPANGLER: Objection. Calls for speculation.
THE WITNESS: I have no idea.
BY MR. BROWN: Q. How much did you earn in the Whitely case?
A. I don't recall. I wasn't -- I just don't recall.
Q. You said in a deposition you had 50 to a hundred hours. What did it turn out to be?
MS. SPANGLER: I'm sorry, I don't --
MR. BROWN: The deposition in Whiteley, he said he had between 50 and a hundred hours.
Q. At the end of the day, what did it turn out to be?
A. I know I didn't do anything more after the deposition that you took, so that would have been my last.00093

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activity on that matter.
Q. So how many hours was it?
A. I don't recall.
Q. Was that at 650 an hour, too?
A. I think that was a couple of years ago. My rate may have been lower back then.
Q. Okay. And how much did you charge in the -- U.S. Government, you're in the U.S. Government case, aren't you, or not?
A. What do you mean by am I in it?
Q. You're a retained expert?
A. Yes, potential expert.
Q. Have you been paid anything for that case yet?
A. I think so. I'm not 100 percent sure.
Q. What percentage of your income comes from testifying in litigation?
A. Probably about 20 percent.
Q. Okay. And the rest is all as a professor?
A. No.
Q. The rest is in consulting work somehow?
A. No.
MS. SPANGLER: Objection. Vague and ambiguous.
BY MR. BROWN: Q. What's the balance, then?
A. I have a number of different sources of income; some consulting, some investments..00094

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Q. I'm not talking about investments. I'm talking about work. I know it's hard to look at the stocks everyday. I'm talking about work.
MS. SPANGLER: Is there a question?
MR. BROWN: Yeah.
Q. What's the other 80 percent? If 20 percent is litigation, what's the other 80 percent consisting of?
MS. MOORE: Objection. Misstates the prior question, "percentage of income coming from testifying" was the prior question.
MS. SPANGLER: I'm not sure you're entitled to that, Mr. Brown. It certainly is about his income.
MR. BROWN: I don't want the dollars. I want to know percentage.
Q. What makes up the other 80 percent? You got 20 percent --
A. I'm willing to go through it by category.
Q. That's all I want.
A. But I think you're assuming that somehow, rather -- since you don't seem to count investments as work, that you're assuming that I have investments in --
Q. I'm sorry I said that.
A. -- in public entities. Most of my investments are in the form of private equity or other known traded securities that I spend a considerable time analyzing and.00095

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monitoring and so forth. But to take the 80 percent and putting to one side your characterization, it would be roughly some consulting. I can't give you percentages, but it would be consulting, including managerial consulting. It would be occasional speeches and lectures. It would be royalties from books and income from private requisite investments of one kind or another.

Q. Okay. That's good enough. Now, let me take a second, and I think I'm either done or awfully close. I guess one other area that we covered very briefly -- from approximately 1980 down to the present time --

A. 1980, did you say?

Q. Yeah, down to the present time. Now, what, in your opinion, have been the significant efforts, if any, by Philip Morris or RJR in attempting to substantially reduce the risk of cigarette smoking?

A. Well, I have an exhibit that I've provided you with, which identifies projects.

Q. That will help you zero in on the dates I gave you?

A. Yes. And if you look on page 2 of that document, if the cutoff that you're interested in is 1980, then there are Project Baton, Project Gemini,.00096

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Project Gypsy --
Q. You're looking at BAT, I'm talking about RJR and the Philip Morris.
A. Sorry.
Premier, Eclipse. There's -- next there's Accord. There's Low Nitrosamine Tobacco, the ones that I've identified in this.
Q. Are there any others that you know of?
A. Not as I sit here right now.
Q. What's the difference in tar, in a Philip Morris cigarette in 1980, as compared to now?
MS. SPANGLER: Objection. Vague and ambiguous and overbroad.
THE WITNESS: Well, there are many cigarettes, but different tar levels.
BY MR. BROWN: Q. Just take the lowest. What is the lowest tar, compared to the lowest tar level today by Philip Morris and RJR, if you know?
MS. SPANGLER: Same objections.
THE WITNESS: As I sit here right now, I don't know. I'd have to look that up.
BY MR. BROWN: Q. Have there been any significant reduction in tar since approximately 1980, in either RJR or Philip Morris brands?
A. Well, I believe by 1980 the ultra low-tar.00097

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cigarettes were already out there, so I'm not sure there was much opportunity left by 1980.
MR. BROWN: Okay. I think we're at the end.
How many hours we got?
MS. SPANGLER: Before we go off the record, let me just note, Mr. Brown, that you were provided with a couple of things, an outline, and I'm sorry, I don't have the marked exhibits in front of me, so I can't give you numbers --
MR. BROWN: The marked outline is Exhibit 7.
MS. SPANGLER: So you were provided with Exhibit 7, a couple of -- well, three charts by Dr. Teece. And I just wanted to make sure that I understand that none of these purport to describe Dr. Teece's opinions in this case in their entirety, that you understand that these were provided as part of Dr. Teece's notes that he had assembled to serve as memory aids during the deposition.
MR. BROWN: Well, some of them look like what we asked for.
MS. SPANGLER: That, as well, and they're responsive. I want to make sure that you understand that the outline doesn't purport to state all of the bases for his opinions, nor all of his opinions in full form.
MR. BROWN: That's fair enough..00098

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MS. SPANGLER: Okay.
(Deposition proceedings concluded
at 1:00 p.m.)

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SIGNATURE OF WITNESS

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CERTIFICATE OF DEPOSITION OFFICER

I, Angie Diner, duly authorized to administer oaths Pursuant to Section 2093 (b) of the California Code of Civil Procedure, hereby certify that the witness in the foregoing deposition stated he or she would testify the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of the said witness was reported by me and thereafter transcribed by me or under my direction into typewriting by computer; that the foregoing is a full, complete and true record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

I further certify that I am not of counsel nor attorney for either or any of the parties in the foregoing deposition and caption named nor in any way interested in the outcome of the cause named in said action.

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818 Mission Street
5th Floor
San Francisco, Ca. 94103
David J. Teece, Ph.D.
LECG, LLC
2000 Powell Street
Suite 600
Emeryville, CA 94608
Re: Lucier v. Philip Morris, Inc., et al.
Dear Dr. Teece,
Your deposition taken in the above matter has been transcribed. This deposition will be available at our office for reading and signing by you for a period of thirty (30) days from the date of this letter, after which time the original will be sealed and sent to the office which noticed the deposition, in accordance with Section 2025 (q) (1) of the California Code of Civil Procedure.
Sincerely,
Tooker & Antz
cc: All Counsel

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